IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 40/1999.

Shri Hari J.S. Bhangui
(since deceased) through
legal representatives:-

(a) Smt. Kamalabai Hari
Bhangui.

(b) Mr. Sanjeev Hari
Bangui.

(c) Sandeep Hari
Bangui, all residing
at Mapa, Panchawadi,
Taluka Ponda, Goa. ... Appellants.

VERSUS

1. Shri Custodio Godinho,
resident of Ponda, Goa.

2. Shri Paulo Godinho,
resident of Ponda, Goa.

3. Shri Nicolav Godinho,
resident of Ponda, Goa. ... Respondents.

Shri Sudin Usgaonkar, Advocte for the Appellants.

Shri R.G. Ramani, Advocate for the Respondent No.1.

CORAM: A. S. AGUIAR, J.

DATE: 11TH JANUARY, 2002.

ORAL JUDGMENT:

This is an appeal from the Order dated 26th August, 1999 passed by the Civil Judge, Senior Division, Quepem, granting an ex-parte injunction in favour of Respondent No.1 against the appellants, in Civil Misc. Application No.125/99/A in Special Civil Suit No.51/99/A filed by the

present Respondent No.1 against the appellant and respondents No.2 and 3 herein, defendants in the said Civil Suit No.51/99/A for the following reliefs:-

> " (a) That the Plaintiff be declared as the exclusive owner of the business as "Custodio Tailor" run in the premises known as Shop No.C4-107 (11) situated in Curchorem Bazar, Curchorem and decree dated 31.7.89 be declared null and void.
>
> (b) That by an Order and Decree of permanent injunction restrain the Defendant No.1 from executing the Decree dated 31.7.89 against the Defendant No.2 in the Execution Application No.2/99 or otherwise defendant No.1, their servants and agents are restrained from interfering, entering upon and interfering in the suit premises.
>
> (c) By an Order of temporary injunction restrain the defendant No.1 from executing the decree dated

31.7.89 against the Defendant No.2 in the Execution Application No.2/99 or otherwise Defendant No.1, their servants and agents are restrained from interfering, entering upon and interfering in the suit premises.

(d) Cost be awarded to the plaintiff."

2. By the said impugned order relief has been granted in terms of prayer clause (a) of the said Civil Misc. Application No.125/99/A which is the same as clause (c) in the Suit.

3. The appellants have impugned the said order on the ground that the said order has been granted in the face of the judgment and decree dated 31.7.1989 passed by the Civil Judge S.D., Quepem in Civil Suit No.64/79 and the Order dated 21st March, 1998 passed in Civil Appeal No.62/89 as well as Order dated 20th November, 1998 in Second Civil Appeal No.22/98 preferred before the High Court and lastly in the face of the Order dated 17th July, 1999 passed in Execution Application No.2/99/B wherein the present respondent No.1 was an obstructionist and his application opposing the

executing proceedings was dismissed.

4. It is contended on behalf of the appellants herein that the respondent No.1 has filed Civil Suit No.51/99/A belatedly and malafidely and obtained an ex-parte order from the Court behind the back of the appellants, despite the aforesaid orders decreeing the appellant's suit and directing execution of the decree passed in the said Suit. It is contended that the respondent No.1 who had filed an Intervention Application in Special Civil Suit No.64/79 which Intervention Application was dismissed, did not appeal from the said order dismissing his application, nor did he file any substantive proceedings for protection of his alleged possession or rights in respect of the suit property. The said respondent waited till the fag end of the proceedings culminating in the dismissal of his application obstructing the execution of the decree. It is therefore contended that there is manifest abuse of the process of law on the part of respondent No.1 in approaching the Court at such a belated stage. Respondent No.1 ought to have taken immediate steps to protect his possession after he became aware of the proceedings filed by the appellant for recovery of possession which he claims he was defending vicariously. The failure

on the part of respondent No.1 to take appropriate proceedings after he became aware that his possession of the suit premises was in jeopardy and filing the suit at the last moment after his obstruction notice was dismissed and the order for his dispossession was about to be executed disentitled the Respondent to any equitable relief. The impugned injunction order therefore ought not to have been granted.

5. On the other hand, it is the contention of the learned Advocate for the respondent that his right of possession in the suit premises was not adjudicated upon in his Application opposing execution which was dismissed on the mere ground that his application for impleadment in Regular Civil Suit No.64/79 was dismissed. He contends that immediately after the Order dated 17th July, 1999 dismissing his application, he filed Suit No.51/99/A and moved Civil Misc. Application No.125/99 for ad interim relief which was granted by the impugned ex parte order.

6. On facts, it is the case of the respondent No.1 that although the premises were taken on lease in the name of his brother Respondent No.2, the premises were actually taken by his father for the

purpose of giving the same to the respondent No.1 for running a tailoring shop. It is his case that Paulo, his brother, was not a tailor and that he being a minor the premises were not taken in his name, but however, the shop licence is in his name as "Custodio Tailors" and that he has been running the tailoring business to the exclusion of his brothers. He further claims that he has been paying the lease rental. However, it may be noted that there is no such averment in the pleadings.

7. It is further contended by the Respondent No.1 that since the brothers, respondents No.2 and 3 were disputing his right to the exclusive possession of the suit shop, he filed Regular Civil Suit No.75/87 for declaring his exclusive possession to the suit premises and obtained an order of injunction. The Suit was ultimately decreed in his favour on 31.7.89.

8. A perusal of the impugned Order which is at page 19 shows that the learned Judge was aware of the orders passed in favour of the appellants. He was also aware of the Order passed in execution dismissing the application of the respondent No.1 obstructing execution. He was also aware of the Intervention Application filed by the respondent

No.1 having been dismissed. Yet relying on the Order of temporary injunction, granted in favour of the respondent No.1 in the suit against his brothers, to which the appellant was not a party, the learned Judge granted an ex parte order of injunction. No notice was given to the appellants of the Application for injunction.

9. From the said impugned order, it is seen that the learned Judge thought it fit to grant the ex-parte order as he was of the opinion that there were two conflicting opinions of the Court which needed to be adjudicated. The Order of Sanguem Court showed that the respondent No.1 was in possession of the suit premises. Be that as it may, the learned Judge being aware of the Order of the Quepem Court and Orders passed in First Appeal as well as Second Appeal confirming the Orders of the Quepem Court and also of Orders on the Execution Application, ought to have refrained from passing the ex parte order and ought to have at least given notice to the appellants before passing such an order. The principles for deciding whether such ex-parte injunction orders should be passed as laid down in Morgan Stanley Mutual Fund v. Kartick Das reported in (1994) 4 S.C.C., 225 ought to have been considered before passing the said Order. One

of the basic principles for passing such an order is that the Court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction. From the facts of this case, it will be seen that the respondent No.1 was fully aware of the suit filed by the appellant for regaining possession of the premises. That being the case, he ought to have taken steps to protect his possession. No doubt he made an application for intervention for being joined as a party which was vehemently opposed by the Appellant (Plaintiff) and his brother, respondent no.2. But after the dismissal of his application, he did not appeal therefrom nor did he file any substantial proceedings for protecting his alleged possession. The learned Judge was seized of these facts prior to passing of the impugned order and therefore the learned Judge ought to have refrained from passing the ex-parte order.

10. It is contended by the learned Advocate on behalf of the respondent No.1, that the appellant, instead of rushing by way of appeal from the said Order, ought to have moved the said Judge who passed the ex parte order for discharge of the injunction under Order 39, Rule 4 of C.P.C. No

doubt by approaching the Court by way of appeal the appellant has chosen a lengthy procedure to achieve an object which could have more conveniently and quickly been done by approaching the Court under Order 39, Rule 4 C.P.C., but then choosing the procedure is the prerogative of the appellants. As the matter stands, it is clear that the Respondent No.1 had chosen to get maximum mileage out of the delay in the pending proceedings and only when the matter reached a stage when his eviction was imminent, he has resorted to filing substantive proceedings and obtaining ex parte injunction order against execution of the Order passed in Suit No.64/99. The learned Trial Judge ought to have exercised his discretion and refrained from granting the equitable relief. Hence the order will have to be set aside.

11. Accordingly, the appeal is allowed. The impugned Order dated 26th August, 1999 is quashed and set aside.

(A. S AGUIAR)
JUDGE.

sl.